FILE COPY

Office - Supreme Court, U. S.
FILED
APR 13 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 722-723

JOHN W. FRANK, ET AL.,

Petitioners,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ELSON & COTTON,
Attorneys for Petitioners.

ALEX ELSON,
WILLARD J. LASSERS,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO 56

INDEX.

PAGE

Petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit:

Opinion below 2

Jurisdiction of this Court..... 2

Statement of the Matter Involved..... 2

Statutes involved 5

Questions presented 6

Reasons relied upon for granting the writ of certiorari 6

Conclusion 7

Brief in support of the petition for writ of certiorari:

Summary of argument..... 9

Specification of errors..... 11

Argument:

Section 2(c) of the Portal Act forbids the application of the *de minimis* maxim to periods of time, however short, which are compensable by express agreement..... 12

The *de minimis* maxim is inapplicable to fixed and certain periods of time, which the employee is regularly and consistently required to work 15

The industry does not regard a five minute period as *de minimis*..... 19

The applicability of the *de minimis* maxim should be determined by the objectives of the statute and the character of the violation involved 20

Petitioners should recover liquidated damages in an amount equal to the amount of unpaid overtime compensation found to be due them 22

(a) There is no evidence in the record tending to show that respondent acted in good faith and had reasonable grounds for believing that it was not violating the Fair Labor Standards Act 22

(b) In the absence of evidence tending to show that respondent acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act, petitioners should recover liquidated damages..... 23

Conclusion 26

Authorities Cited.

Cases.

Anderson v. Mt. Clemens Pottery Company, 328 U. S. 680 ..... 5, 7, 10, 12, 15

Day & Zimmerman v. Reid, 168 Fed. (2d) 356 (C. C. A. 8th, 1948) 26

Lasater v. Hercules Powder Co., 73 F. Supp. 264..... 16

Mabee v. White Plains Publishing Company, 327 U. S. 178 18

McComb v. C. A. Swanson and Sons, 77 F. Supp. 716.. 16

Overnight Motor Transportation Company v. Missel, 316 U. S. 572 (1942)..... 23

Skidmore v. Swift and Company, 323 U. S. 134 (1944). 25

Timmons v. Wagoner County Coal Co., 13 Labor Cases Par. 64,006 16

Tully v. Joshua Hendy Corp., 13 Labor Cases Par. 64,696 17

United States v. Darby, 312 U. S. 100..... 20

Statutes.

Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201 et seq.:

Section 2(a) 20

Section 7 ..... 2, 5

Section 16(b) 2, 5, 23

Portal-to-Portal Act, 61 Stat. 84, 29 U. S. C. § 251, et seq.:

Section 2(a) 5

Section 2(c) 9, 10, 11, 12

Section 9 23

Section 11 ..... 6, 24

Other Authorities.

BNA Collective Bargaining Negotiations and Contracts, p. 57:121 19

Collective Bargaining Agreements, Bulletin No. 908-8 (1948), U. S. Department of Labor 19

93 Cong. Rec. 2295 14

Interpretative Bulletin: "General statement as to the effect of the Portal-to-Portal Act," p. 33, 29 CFR Sec. 790.24(a), FR, Nov. 18, 1947 13

Interpretative Bulletin on the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, 29 Code Fed. Reg. § 790.22(b) (Supp. 1947) 25

House Conference Report (Rept. 326, 80th Cong., 1st Sess., p. 10) 14

Labor Coordinator (Research Institute of America) J-5, 962 19

Senate Report No. 48, 80th Cong., 1st session (1947), pp. 42-43 14

Studies in Personnel Policy, No. 95 (October 1948), National Industrial Conference Board, Inc., pp. 23-24 20

Union Contracts and Collective Bargaining (Labor Equipment-Prentice Hall) par. 53,484 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. _____

JOHN W. FRANK, ET AL.,

Petitioners,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, John W. Frank, *et al.*, plaintiffs below, pray that a writ of certiorari issue to review a judgment of the Court of Appeals of the Seventh Circuit entered on February 10, 1949 reversing a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and remanding the cause with instructions to dismiss the complaint.

Opinion Below.

The opinion of the Court of Appeals (T. 553-59) is reported at 172 Fed. (2) 712 (1949). The District Court did not write a formal opinion, but entered detailed Findings of Fact (T. 517-21) and Conclusions of Law (T. 522-26).

Jurisdiction of This Court.

The judgment of the Court of Appeals was entered February 10, 1949 (T. 560-61).

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code.

Statement of the Matter Involved.

This cause is an action for unpaid overtime compensation and an additional equal amount as liquidated damages brought by petitioners, plaintiffs below, under the provisions of Sections 7 and 16(b) of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., §§ 207, 216(b). The defendant took appropriate action to assert defenses under the Portal-to-Portal Act, 61 Stat. 84, 29 U. S. C. § 251, which was enacted several months after this action was commenced. On the basis of detailed findings of fact (T. 517-21) and Conclusions of Law (T. 522-26), the Trial Court entered judgment for petitioners for the amount found to be due them for unpaid overtime compensation, but failed to award an additional equal amount as liquidated damages. There was no formal opinion. The respondent appealed from the judgment insofar as it awarded overtime compensation (T. 531-2), and petitioners filed a cross-appeal from the judgment insofar as it failed to award liquidated damages (T. 539-40). The Court of Appeals reversed the judgment for unpaid overtime compensation

and so had no occasion to consider petitioners' cross-appeal (T. 560-61).

The facts are correctly stated in the opinion of the Court of Appeals (T. 553-55), as follows:

> "Plaintiffs make claim for alleged unpaid overtime compensation under Sec. 16(b) of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C., Sec. 200, *et seq.*), covering the period from July 15, 1941, to July 19, 1945. Judgment was entered in favor of 149 plaintiffs in the sum of $14,211.62, plus interest and costs, and $1,500.00 attorney's fee. The amounts awarded ranged from $5.05 to Harry J. Schumacher to $168.53 for Alvin Arzig; thirty-three plaintiffs were awarded less than $50.00 each; sixty-nine less than $100.00 each. Defendant appeals from the judgment entered.
>
> "The trial court refused to award liquidated damages, concluding that the defendant's failure to compensate the plaintiffs in accordance with the Fair Labor Standards Act was in good faith and that the defendant has reasonable grounds for believing its acts were not a violation of the Fair Labor Standards Act. Plaintiffs cross-appeal from such determination.
>
> "During the period with which we are here concerned defendant was engaged in the meat packing business. Its plant in Chicago, Illinois, covered an area of four city blocks. It purchased livestock in various parts of the United States for shipment to its Chicago plant. The meat products and by-products produced at Chicago were shipped by defendant throughout the United States. A total of four thousand persons were employed at the Chicago plant, which included 276 employed in the mechanical division, whose duties were to maintain and repair buildings, machinery, and equipment at the plant. The personnel in this division were blacksmiths, carpenters, tinsmiths, electricians, painters, millwrights, steamfitters, elevator repair men, and others in like vocation. The shops comprising the mechanical division were grouped together within a space of 900 feet. Each of the 149

plaintiffs herein was employed in the mechanical division. Most of them spent a large portion of their time working outside of their assigned shops.

"Substantial evidence supports the trial court's findings that the scheduled working hours for employees of the mechanical division while working the day shift were from 8:00 A. M. to noon and from 12:30 P. M. to 4:30 P. M.; that defendant required all employees of the mechanical division, including plaintiffs, to be dressed in their working clothes prior to punching the time clock and to punch the clock before commencing work each morning; that defendant promulgated a rule requiring employees of the mechanical division to report to the shops to which they were assigned, dressed for work and ready to commence work, at 7:55 A. M.; that this rule was enforced by the supervisory personnel of the mechanical division and that employees were further appraised and reminded of the rule by signs prominently posted in various places, such as the dressing rooms and near the time clocks; that plaintiffs commenced their usual daily activities at 7:55 A. M., at which time they received instructions when necessary from the supervisory personnel, obtained or removed their tools from tool chests and cabinets, and, when their presence was required in other portions of the plant, left their shops carrying their tools or supplies to go where their work was assigned.

A contract between the certified union and the defendant was in effect which provided for a basic workday of eight hours and a basic workweek for forty hours, and that workers should be paid at one and one-half times their regular rate for all overtime hours. It is admitted that when the defendant computed the compensation due each plaintiff it did not include the period from 7:55 A. M. to 8:00 A. M. as part of the workday. This action was brought to recover overtime compensation for that five minute period for those days on which the time cards disclosed plaintiffs punched the time clock at or before 7:55 A. M."

The Court of Appeals overruled defendant's Portal Act defenses and held that the additional five minutes worked each day pursuant to company rule was compensable under the express provisions of a written contract, and consequently recovery was authorized by Section 2(a) of the Portal-to-Portal Act, 61 Stat. 85, 29 U. S. C. § 252(a). It denied recovery, however, solely because it considered the time to be *de minimis* under *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680.

After plaintiffs had filed a petition for rehearing, the Administrator of the Wage and Hour Division of the Department of Labor sought (T. 562) and obtained (T. 564) leave to file a memorandum in support of the petition. The petition for rehearing was denied on March 9, 1949 (T. 565).

Statutes Involved.

The statutes involved are Section 7 of the Fair Labor Standards Act, 52 Stat. 1063, 29 U. S. C. § 207, which requires an employer to pay his employees time and one-half for all hours worked over forty in any workweek; Section 16(b), of that Act, 52 Stat. 1069, 29 U. S. C. § 216 (b), which gives an employee a cause of action for unpaid minimum wages and an additional equal amount as liquidated damages; Section 11 of the Portal-to-Portal Act, 61 Stat. 89, 29 U. S. C. § 261, which permits a court to withhold liquidated damages, or to award an amount less than the amount of the unpaid minimum wages where the employer shows that he acted in good faith and had reasonable grounds for believing that he was not violating the Fair Labor Standards Act; Section 2(a) of the Portal Act, 61 Stat. 85, 29 U. S. C. § 252(c) which provides that no employer shall be subject to liability under the Fair Labor Standards Act unless the activity was compensable by the express provisions of a contract, or by custom or

practice; and Section 2(c) of the Portal Act, 61 Stat. 85, 29 U. S. C. § 252(c) the relevant portions of which are as follows:

> "(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of sub-sections (a) and (b) of this section."

Questions Presented.

1. May an employer who regularly and continuously requires its employees to work five minutes additional each day invoke, as a defense to an employees' action under the Fair Labor Standards Act, the *maxim de minimis non curat lex* where the time and activities involved are compensable by express agreement and therefore compensable under the Portal-to-Portal Act?

2. Where the defendant offers no evidence tending to show that it acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act, may the trial court deny liquidated damages under Section 11 of the Portal-to-Portal Act?

Reasons Relied Upon for Granting the Writ of Certiorari.

1. The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

2. The Court of Appeals has decided a federal question (the scope of the *de minimis* maxim) in a way probably in conflict with applicable decisions of this Court.

The decision of the Court of Appeals:

(a) would permit employers throughout industry to deny compensation for time worked pursuant to agreement, contrary to the express language and purposes of the Fair Labor Standards Act and the Portal-to-Portal Act.

(b) runs counter to established industrial practices, would undermine existing collective bargaining agreements and encourage disputes leading to industrial strife.

(c) distorts the decision of the court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, to the financial gain of employers and to the financial detriment of employees.

(d) is the first decision of its kind anywhere in the country and unless reversed by this court, will be followed by other employers throughout industry resulting in extensive and burdensome litigation.

Conclusion.

For the above reasons, more fully supported in the attached brief, it is submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,

ELSON AND COTTON,
By ALEX ELSON.

ALEX ELSON,
WILLARD J. LASSERS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. .....

JOHN W. FRANK, ET AL.,
Petitioners,

vs.

WILSON & CO., INC.,
Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Summary of Argument.

The opinion of the court below is a judicial determination that an employer may, contrary to the provisions of the Fair Labor Standards Act, require his employees to work five minutes additional each day, although such time and the activities involved are compensable by express agreement and are not therefore barred by the Portal-to-Portal Act.

It reaches this result in the face of the clear language of Section 2 (c) of the Portal Act, 61 Stat. 85, 29 U. S. C. § 252 (c), which requires that *all* time compensable by express contract be included in determining the time during which an employee was employed, for purposes of the Wage

and Hour Law. It supports its position by applying the *de minimis* maxim on the authority of *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, in spite of the fact that there this Court was speaking with reference to odd fragments of time spent walking and doing miscellaneous preliminary jobs interspersed with personal activities unrelated to employment. The amount of these odd fragments of time, moreover, in that case, varied from employee to employee, and even as to the same employee the amount varied from day to day.

It is our firm belief that the opinion of the court not only works a hardship on the plaintiffs and confers a windfall upon the defendant, but also has serious adverse implications upon employees throughout industry. As a result of the court's opinion, there is nothing to prevent the defendant from reinstating at once its rule requiring employees to report to work at 7:55 A. M. Not only is this true, but every employer would find support in the opinion for promulgating a similar rule.

We submit that the opinion of the Court of Appeals overlooks the following important points:

(1) Section 2 (c) of the Portal Act forbids the application of the *de minimis* maxim to periods of time, however short, which are compensable by express agreement.

(2) The *de minimis* maxim is inapplicable to fixed and certain periods of time which the employee is regularly and consistently required to work.

(3) Industry does not regard a five-minute period as *de minimis.*

(4) The applicability of the *de minimis* maxim should be determined by the objectives of the statute and the character of the violation involved.

In addition, the Court of Appeals, because of its conclusions, did not consider the following:

(5) Petitioners should recover liquidated damages in an amount equal to the amount of unpaid overtime compensation found to be due them.

(a) There is no evidence in the record tending to show that respondent acted in good faith and had reasonable grounds for believing that it was not violating the Fair Labor Standards Act.

(b) In the absence of evidence tending to show that respondent acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act, petitioners should recover liquidated damages.

Specification of Errors.

1. The Court of Appeals erred in failing to permit recovery under Section 2 (c) of the Portal-to-Portal Act, 61 Stat. 85, 29 U. S. C. § 252 (c), for periods of time made compensable under the express provisions of a written contract.

2. The Court of Appeals erred in holding the *de minimis* maxim applicable to fixed and certain periods of time which the employee was regularly and consistently required to work under rules systematically enforced by the employer.

3. The Court of Appeals erred in failing to direct the District Court to award petitioners double damages since respondent offered no evidence tending to show that it acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act.

ARGUMENT.

I.

Section 2(c) of the Portal Act Forbids the Application of the De Minimis Maxim to Periods of Time, However Short, Which Are Compensable by Express Agreement.

The Court of Appeals stated in its opinion that it is "bound by the finding of the district court that the plaintiffs were required to work five minutes in excess of the eight regular hours on each of the days indicated by the time cards in evidence (as compiled in the stipulation)". The court also concluded that the activities of the plaintiffs were covered by an express provision of a written contract. These conclusions clearly distinguish this case from the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and all of the other cases cited by the court applying the *de minimis* maxim. In the *Mt. Clemens* case and in the other cases none of the activities for which compensation was sought were compensable by express agreement or by custom or practice.

Consequently Section 2 (c) of the Portal Act, 29 U. S. C. § 252 (c) which was irrelevant to these other cases (or was not yet enacted) must be considered here and compels a different result. The section provides:

> "In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, *in determining the time* for which an employer employed an employee there shall be counted *all that time,* but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section." (Italics ours.)

It is to be noted that this language, applicable to claims pending at the time the Act became law, clearly and unequivocally provides that in determining the time for which an employer employed an employee *all* of the time compensable under the Act shall be counted.[1]

Moreover, Section 2(c) would have no purpose unless it is construed to mean that the *de minimis* doctrine shall not apply to actions based on contract or custom. Sections 2(a) and (b) immediately preceding, exempt an employer from liability except for claims based on contract or custom. If we construe Section 2(c) to mean simply the converse of Sections 2(a) and (b), namely, that where a claim is based on contract or custom, the employer is liable, Section 2(c) becomes useless surplusage.

Legislative history supports our position: when Senator Cooper, one of the sponsors of the new legislation, was asked during the Senate debates whether the problem could not be handled legislatively by making the *de minimis* rule apply to all time less than a fixed amount, he replied that a *de minimis* rule, even though of a fixed nature, would create considerable confusion for employer and employee, thereby increasing, instead of decreasing the amount of litigation (93 Cong. Rec. 2300). It was the desire to establish a rule of general application for determination of time worked which would remove all uncertainty and would not be dependent upon divergent judicial interpretations. Sponsors of the new legislation were fully aware of Judge Picard's dismissal of the *Mt. Clements* case under the *de*

1. The Administrator of the Wage and Hour Division, in commenting upon Section 2(c), quotes the section, italicizing the words "all" and "only", and adds:

> "* * * the statute expressly provides that *all* * * * time [compensable by contract or custom] shall be counted in computing hours worked." (The italics were added by the Administrator.) Interpretative Bulletin: "General statement as to the effect of the Portal-to-Portal Act," p. 33, 29 CFR Sec. 790.24(a), FR, Nov. 18, 1947.

minimis doctrine, but they pointed out that the holding there was applicable only to that particular case and did not offer a general solution to the problem (Senate Report No. 48, 80th Cong., 1st sess. (1947), pp. 42-43; 93 Cong. Rec. 2295).

Moreover, in the conference report, the managers on the part of the House make the following statement with reference to Section 2(c):

> "This provision, which is in the nature of a clarifying statement, is for two purposes, (1) to emphasize that employers are not relieved from liability for the payment of minimum wages and overtime compensation under the three Acts for *any* time during which the employee engaged in activities compensable under the rules above stated, and (2) * * *." (Italics ours.) (Rept. 326, 80th Cong., 1st Sess., p. 10.)

It is obvious that Congress intended by the Portal Act to reach claims similar to those involved in the *Mt. Clemens* case and the other cases cited by the Court of Appeals, but did not intend to deny to employees the right to recover for time worked for an employer which the employer had expressly agreed to pay for.

The rationale underlying the position that the *de minimis* maxim is inapplicable to agreed compensable time is simple. One should not be relieved of a contract obligation particularly where it is supported by a remedial statute. When the employer agrees to pay for time worked the failure to pay for such time is no different than the payment of an hourly rate less than an agreed hourly rate.

It is clear from the Congressional debates of the Portal-to-Portal Act that one of the principal reasons that led Congress to pass the Act was to remove the possibility of windfall recovery to employees for activities which were not compensable by agreement or by custom. The wind-

fall aspect of recovery is completely eliminated where there is an express agreement to compensate for the time. If, however, recovery is denied where there is an express agreement, the employer receives a windfall.

To deny the employees the right to recover because the time involved is small, is manifestly unjust. The *de minimis* maxim was developed by courts of equity. Like all such maxims it should be used to do equity and not to bring about an inequitable result.

II.

The De Minimis Maxim Is Inapplicable to Fixed and Certain Periods of Time, Which the Employee Is Regularly and Consistently Required to Work.

In its opinion the Court of Appeals upheld the trial court's finding that the plaintiffs were required to commence their usual activities five minutes before the time defendant computed the start of their working day for payroll purposes. This five minute period was fixed and certain throughout the four-year period involved. The amount due each of the plaintiffs under the judgment of the trial court varied only to the extent that the plaintiffs were employed for varying periods of time during the four-year period, but for all plaintiffs there was no question that during the time they were employed they each were required to work a fixed and certain period of five minutes a day. This circumstance provides a clear basis of distinction between this case and the cases cited in the opinion for applying the *de minimis* maxim.

In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and the other cases cited by the court, the time involved was not fixed, was uncertain and irregular, and differed with each of the employees involved. There, this Court

stated the facts relevant to this particular issue as follows (p. 689):

> "The employees . . . . . were required to be ready for work at their benches at the scheduled starting times. They were given 14-minute periods in which to punch the time clocks, walk to the places of work and prepare for productive labors. But there was no requirement that an employee check in or be on the premises at any particular time during that 14-minute interval. As noted by the District Court, there was no evidence 'that if the employee didn't get there by 14 minutes to seven he was fired and there is much testimony to prove that stragglers came in as late as one minute to seven'."

From this statement of facts, it would appear that the claim being made was for such time within the 14-minute period as the employee could show was devoted to walking to the place of work or engaging in preparatory activities. So far as requirements of the employer were concerned, an employee could report as late as one minute prior to the scheduled working time. In order to establish a claim in the *Mt. Clemens* case, it was necessary to engage in an elaborate pacing off of distances and the use of stop watches, tape measures, and other mechanical devices. Even after all these linear and time measurements were made, the result was an approximation at best.

The other cases relied upon by the Court of Appeals (T. 559) may be distinguished in a similar fashion: *McIntyre* v. *Joseph E. Seagram and Sons Co., Inc.*, 72 F. Supp. 336, involved a claim for walking and clothes changing time. *Lasater* v. *Hercules Powder Co.*, 73 F. Supp. 264, concerned travel time from the plant gate to the work place and clothes changing time. *Timmons* v. *Wagoner County Coal Co.*, 13 Labor Cases Par. 64,006, was another travel time case while *McComb* v. *C. A. Swanson and Sons*, 77 F. Supp. 716, was another clothes

changing case. *Tully* v. *Joshua Hendy Corp.*, 13 Labor Cases Par. 64,696, related to work during the lunch period.

The irregularity and uncertainty of the amount of time involved, apart from the fact that there was no agreement to compensate for such time, afforded some justification for the application of the *de minimis* maxim in the cases cited. Since the employees kept no record, the courts were forced to rely upon stop-watches and mechanical measuring devices to approximate retrospectively the time involved. These methods converted the judicial process into a guessing game. But no such considerations enter this case. Here the trial court did not have to make any guesses. The time involved was fixed, certain and recorded.

The court, in its opinion, states that each situation presented must be examined in the light of what is "substantial" and "reasonable" in view of all the factors present (T. 558). It then refers to two factors: first, that not more than five minutes a day is involved (T. 558); second, that "checking in at the time clock, the receiving of instructions from supervising personnel, the obtaining of tools from tool chests and cabinets, and the walking to the place plaintiffs were required to be, are similar to the preliminary activities which were held governed by *de minimis* in the *Mt. Clemens* case" (T. 558). With reference to the second factor, it should be pointed out that the opinion is inconsistent. The employees in this case are maintenance employees. In the *Mt. Clemens* case the employees were production workers. Earlier in its opinion the court points up this distinction. The opinion states: "The court also found that the plaintiffs were required by the rule of the company to be dressed for work and punched in by 7:55 A. M. Much of the work that they did immediately after punching in, such as receiving instructions, drawing materials, going from the shop to

the place of work, and carrying tools, was the same type of activity that they carried on from time to time throughout the day. It must be kept in mind that these plaintiffs were maintenance men who might remain on one job all day, or who might go from place to place in the plant and participate in half a dozen jobs on any given day" (T. 556).

The distinction between fixed and regular activities and irregular or occasional activities has already been adopted by this Court in determining whether an employer's interstate business is adequate to bring it under the Fair Labor Standards Act. In *Mabee* v. *White Plains Publishing Company*, 327 U. S. 178, an action by employees for overtime compensation, this Court held that the statute applied to the publisher of a daily newspaper where only one-half of one percent of its circulation was out of state. It specifically rejected a *de minimis* argument on the ground that "while sporadic or occasional shipment of insubstantial amounts of goods" might be insufficient to impose coverage, "there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size" (327 U. S. 178, 181). A similar distinction should be made concerning work time questions. When the violation is regular and certain and recurs throughout the period in question, there is no reason for the application of the *de minimis* maxim. The employer knows what his obligation is, the employee can prove his claim, and the court is relieved of the burden of guessing the amount due.

III.

Industry Does Not Regard a Five Minute Period as De Minimis.

The industrial world, unlike the business and professional world, lives rigidly by the clock, not the calendar. Employees are customarily paid by the hour. They punch in and punch out at a time clock. Where an employee is absent for a few hours of a day he is docked; where he is asked to work overtime, he receives additional compensation. The employer expects its men to start work promptly at the scheduled time; the employees expect to quit promptly at the scheduled time. In general, the industrial worker's pay starts when he starts to work, and stops promptly when he stops.

Because tardiness interferes with efficient production, it is sharply penalized. The record shows that where an employee punched in after 7:55 A. M. and before 8:00 A. M. he was reprimanded or docked up to half an hour (T. 73, 83, 103-4, 137, 175). It is not uncommon for collective bargaining agreements to provide that an employee should be docked if he is two or three minutes late to work, and to provide increasing penalties for repeaters.

BNA Collective Bargaining Negotiations and Contracts, p. 57:721.

Collective Bargaining Agreements, Bulletin No. 908-8 (1948), U. S. Department of Labor, p. 73.

Labor Coordinator (Research Institute of America) J-5, 962.

Union Contracts and Collective Bargaining (Labor Equipment-Prentice Hall) par. 53,484.

It might be noted, also, that where tardiness is not covered by collective bargaining, it is common for the company rules to provide for docking for the minutes thus lost even if the employee is only one or two minutes late. See *Studies in Personnel Policy*, No. 95 (October 1948), National Industrial Conference Board, Inc., pp. 23-24.

In fact the importance to the respondent of the five minute period is already shown by the aggressive measures which it took to enforce it (T. 73, 83, 103-4, 137, 175). It should not be heard to say now that its rule may be dismissed as *de minimis*.

IV.

The Applicability of the De Minimis Maxim Should Be Determined by the Objectives of the Statute and the Character of the Violation Involved.

We submit that, in determining the *de minimis* question, it is vital that the nature of the violation be evaluated in terms of the objectives of the Fair Labor Standards Act.

One of those objectives, as stated in the Fair Labor Standards Act itself and in the decisions of this Court, is to prevent the producer of goods manufactured under substandard working conditions from having an unfair competitive advantage over goods produced in conformity with the Act.

> § 2(a) of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 202(a).
> *United States* v. *Darby*, 312 U. S. 100, 122.

Here the defendant promulgated and enforced a five minute rule. It did so because it was to its advantage to do so. By violating the Act it gained a competitive

advantage over other complying employers. How can it be said that the advantage so gained is *de minimis?* It pocketed in excess of $14,000 so far as the 149 plaintiffs are concerned and twice that sum if we were to include all of the 276 employees of the mechanical department. While the amount involved is not great to a large employer, it is still a tidy sum.

The Court of Appeals, however, instead of following the basic purposes of the Act, held the case to be governed by the *Mt. Clemens* decision, and also referred to the smallness of the amounts sought to be recovered. It points out that thirty-three plaintiffs were awarded less than $50.00 each and sixty-nine plaintiffs less than $100.00 each, and that one plaintiff was awarded as little as $5.05. The variation in amounts awarded each of the plaintiffs is explained by the circumstances that they were employed for varying lengths of time within the suit period of approximately four years. Thus the plaintiff awarded $5.05 was employed for only 32 days during the suit period, whereas the plaintiff awarded $168.53 was employed for four years. The fallacy of using the amount awarded each plaintiff as the test is best demonstrated by assuming that the five minute rule was invoked by the defendant against all of the four thousand employees in its Chicago plant for the suit period. In such a situation the amounts awarded each plaintiff would vary within a range similar to this case but the total amount due would be, assuming a similar incidence of turnover, a huge sum.

As a result of the opinion the defendant would be legally safe in restoring the five minute rule and making it applicable this time to all of its many thousands of employees in its Chicago plant and other plants throughout the country. The restoration of the five minute rule under such circumstance will result in the defendant reap-

ing a financial gain of windfall proportions to the competitive disadvantage of other employers contrary to the purpose of the statute as well as to the financial status of the individual employees involved. Looking at the nature of the violation here involved, in terms of purposes of the statute, it cannot be said that the *de minimis* maxim is applicable to it.

V.

Petitioners Should Recover Liquidated Damages in an Amount Equal to the Amount of Unpaid Overtime Compensation Found to Be Due Them.

Because of the conclusions of the Court of Appeals on the other issues in the case, it did not consider this issue.

(a) There Is No Evidence in the Record Tending to Show That Respondent Acted in Good Faith and Had Reasonable Grounds for Believing That It Was Not Violating the Fair Labor Standards Act.

The trial court concluded as a matter of law that defendant's failure to compensate plaintiffs in accordance with the Fair Labor Standards Act was in good faith and that it had reasonable grounds for believing that its act or omission was not a violation of the Act (Conclusion of Law 7, T. 523). Accordingly, it denied liquidated damages.

The record, however, is devoid of evidence to show that defendant acted in good faith or had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act. In fact defendant did not even propose such a finding of fact (R. 503-505).

(b) In the Absence of Evidence Tending to Show That Respondent Acted in Good Faith and Had Reasonable Grounds for Believing That Its Act or Omission Was Not a Violation of the Fair Labor Standards Act, Petitioners Should Recover Liquidated Damages.

Section 16(b) of the Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. Sec. 216(b), provides:

> "Any employer who violates the provisions of section 6 [relating to minimum wages] or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages * * *."

After the passage of the Act in 1938, the question arose whether the courts were at liberty to deny or to limit the award of liquidated damages once the amount of the unpaid compensation had been determined, or whether the statute made mandatory an award of liquidated damages equal to the amount of the unpaid compensation.

The latter view, that an award of liquidated damages was mandatory, was made the law of the land by a unanimous decision of this Court in *Overnight Motor Transportation Company* v. *Missel,* 316 U. S. 572 (1942).

When the portal pay controversy arose, there was sentiment in Congress for modification of the rule of the *Missel* case. Accordingly, two sections designed to modify this rule were incorporated in the Portal-to-Portal Act, 61 Stat. 84, 29 U. S. C. § 251. One was Section 9, 29 U. S. C. § 259, which provides that no liability whatever shall be imposed under the Fair Labor Standards Act where the employer pleads and proves that he acted in good faith in accordance with a rule or regulation of any agency of the United States. That section is not involved

here. The other section, which is relevant here, is section 11, 29 U. S. C. § 261, which reads as follows:

> "Sec. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such act."

On the record before the Court, petitioners contend that it was error for the trial court and the Court of Appeals not to award liquidated damages in an amount equal to the amount of the unpaid overtime compensation found to be due them. Section 11 provides that the court may in its sound discretion refuse to award the full sum due as liquidated damages only where the employer "shows to the satisfaction of the court" that his act or omission was "in good faith" and that he had "reasonable grounds" for believing it not to be a violation of the Fair Labor Standards Act. It is clear that the burden of proof is upon the employer with respect to each of these statutory requirements if he is to be relieved from paying liquidated damages.

It is equally clear that if he fails to prove each of the two essential facts, the court has no discretion, but must award the full measure of liquidated damages.

That the burden of proof is on the employer seeking relief under Section 11 appears so patent from its language that it seems necessary to say little more.

FILE COPY

The Administrator of the Wage and Hour Division of the Department of Labor in an official Interpretative Bulletin likewise has construed Section 11 as placing the burden of proving good faith on the employer. Section 790.22(b) of Interpretative Bulletin on the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, 29 Code Fed. Reg. § 790.22(b) (Supp. 1947) provides:[1]

> "The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employer must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16(b) of the Fair Labor Standards Act, regardless of whether the action was instituted prior to or on or after May 14, 1947, and regardless of when the employees activities on which it is based were engaged in. *If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages*" (Italics added).

The Portal-to-Portal Act is relatively new. There appears to be only one federal appellate decision in point,

1. In *Skidmore* v. *Swift and Company*, 323 U. S. 134 (1944), this Court referred to the interpretative bulletins of the Administrator as constituting a "body of experience and informed judgment to which courts and litigants may properly look for guidance."

Day & Zimmerman v. *Reid*, 168 Fed. (2d) 356 (C. C. A. 8th, 1948). There the Circuit Court of Appeals for the Eighth Circuit, on facts somewhat analogous to those in the case at bar, ruled that where the defendant had failed to convince the court of its good faith, liquidated damages would be allowed.

Conclusion.

If the opinion stands it will be an open invitation to employers throughout industry to promulgate five minute rules similar to that of the defendant. This result was not intended by Congress, is not authorized by the language of the Fair Labor Standards Act and is contrary to the express language of the Portal-to-Portal Act. The opinion relies upon the equitable maxim *de minimis non curat lex*. For the reasons that the claim involved in this case is compensable by express agreement, is fixed and certain, and is substantial in terms of the purposes of the statute involved, we contend that the maxim *de minimis* is inapplicable. We request that the petition for the writ of certiorari be granted.

Respectfully submitted,

ELSON & COTTON,
By ALEX ELSON,
Attorneys for Petitioners.

ALEX ELSON,
WILLARD J. LASSERS,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 12 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

Nos. 722 and 723

JOHN W. FRANK, ET AL.,

Petitioners,

vs.

WILSON & CO., INC.,

Respondent.

WILSON & CO., INC. BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR THE SEVENTH CIRCUIT.

RICHARD C. WINKLER,
JOHN L. COCKRILL,
4100 S. Ashland Ave.,
Chicago, Illinois,
Counsel for Respondent.

May 9, 1949.

THE DARTNELL-WARREN PRINTING COMPANY, 630 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Brief in Opposition to Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction of this Court	2
A Statement of the Case	3
Statutes Involved	5
Summary of Argument	6
Argument:	
I. Petitioners have failed to set forth grounds upon which the Supreme Court could raise a Writ of Certiorari	8
II. The de minimis maxim is not limited by fixed and certain periods of time regularly and consistently worked	9
III. The de minimis maxim was properly applied by the Court of Appeals, and is consistent with the policy of the Fair Labor Standards Act	12
IV. Petitioners now seek to raise new issues not heretofore raised in any court below, or not decided in the lower courts	24
A. The interpretation and application of of Section 2(c) of the Portal Act has not been raised heretofore by the petitioners	24
B. The issue of liquidated damages was not determined by the Court of Appeals, and this Court should not decide questions not dealt with by the Court of Appeals	28
Conclusion	30

AUTHORITIES CITED.

Cases.

Adkins v. E. I. DuPont de Nemours Company, Inc., 13 Lab. Cas. § 64,025 21

Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680 .....4, 6, 8, 9, 10, 11, 12, 13, 18, 19, 21, 22, 25, 28

Anderson v. Mt. Clemens Pottery Co., 69 Fed. Supp. 710 .....9, 19, 20

Bauler v. Pressed Steel Car Co., 81 Fed. Supp. 172 .. 29

Burke v. Mesta Machine Co., 79 Fed. Supp. 588 29

Burnet v. Commonwealth Improvement, 53 S. Ct. 198, 287 U. S. 145.....25, 28

Cameron v. Bendix Aviation Corp., 65 Fed. Supp. 510 .....17, 18

Hunter v. Madison Avenue Corp., No. 10720, 4/22/49 (C. C. A. 6) 10

Jackson v. Northwest Airlines, 75 Fed. Supp. 32 29

Jewel Ridge Coal Corp. v. Local 6167, U. M. W. A., 325 U. S. 161, 65 S. Ct. 1063 18

Mabee v. White Plaines Publishing Company, 327 U. S. 178 10

McIntyre v. Seagram & Sons Company, 72 Fed. Sup. 366 20

Owens v. Union Pac. R. Co., 66 S. Ct. 1271, 319 U. S. 715 .....25, 28

Sawyer v. Bay State Motor Express Co., 14 Lab. Cas. § 64,417 29

Skidmore v. Swift & Company, 323 U. S. 134, 65 S. Ct. 161 .....16, 17

Sonzinsky v. U. S., 57 S. Ct. 554, 300 U. S. 506 .....25, 28

Timmons v. Wagoner County Coal Company, 13 Lab. Cas. § 64,696 20

Tully v. Joshua Hendy Corp., 15 Lab. Cas. § 64,696 .. 21

Waterloo Distilling Corp. v. U. S., 51 S. Ct. 282, 282 U. S. 577 .....25, 28

Statutes.

Fair Labor Standards Act, 52 Stat. 1063, 29 U. S. C. § 201, et seq.:
Section 7 .....5, 26, 28
Section 16(b) 3, 5

Judicial Code, 28 U. S. C. § 1254, Section 1254 2

Portal to Portal Act of 1947, 61 Stat. 89, 29 U. S. C. § 261 25
Section 2(a) 5, 27
Section 2(b) 27
Section 2(c) 5, 6, 7, 24, 26, 27
Section 11 .....5, 29

Other Authorities.

Administrative Opinion:
1944-1945 W-H Man. 234 13
1944-1945 W-H Man. 1193 14
5 WHR 148 14

Conference Report on H. R. 2157, p. 2 (Portal-to-Portal Act of 1947) 26

Congressional Record, 2/28/47, p. 1621 29

Congressional Record, 5/1/47, p. 4513 29

Congressional Record—House—5/1/47, p. 4515..... 27

Interpretative Bulletin #13, 1944-1945 W-H Man. 1702:
Paragraph 2 15
Paragraph 3 13

Paragraph 9 14
Paragraph 12 15
Paragraph 14 ..... 15, 16

Part 516.4 Record Keeping Regulations, 3 WHR 31, 32 13

Senate Judiciary Committee Report on H. R. 2157 (Portal-to-Portal Act of 1947) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

Nos. 722 and 723.

JOHN W. FRANK, ET AL.,

Petitioners,

vs.

WILSON & CO., INC.,

Respondent.

WILSON & CO., INC. BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, WILSON & CO., INC., defendant below, files this, its brief in opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit filed by the petitioners, JOHN W. FRANK, *et al.*, plaintiffs below, predicated on the grounds that the petitioners have not stated reasons upon which a Writ of Certiorari could be granted under Rule 38(5) of the Rules of the Supreme Court of the United States.

Respondent is limiting its brief to the points raised in the petition herein and will not treat other points cov-

ered in the decision rendered by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, dated February 10, 1949, is found in the Transcript of the Record at pages 553-559 and is reported in 172 Fed. (2d) 712. The District Court did not file a formal opinion, but did make an oral finding (T. pp. 428-429) and entered Findings of Fact (T. pp. 517-521) and Conclusions of Law (T. pp. 522-526).

JURISDICTION OF THIS COURT.

Petitioners seek to invoke the jurisdiction of this Court under Section 1254 of the Judicial Code.

A STATEMENT OF THE CASE.

This action was originally brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, to recover alleged unpaid overtime compensation under Section 16(b) of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. Sec. 200, *et seq.*) covering the period from July 15, 1941 to July 19, 1945. Judgment was entered in the Trial Court in favor of 149 plaintiffs in the sum of $14,211.62, plus interest and costs, and $1,500.00 attorney's fee. The amounts awarded ranged from $5.05 to Harry J. Schumacher to $168.53 for Alvin Arzig; thirty-three plaintiffs were awarded less than $50.00 each; sixty-nine less than $100.00 each (T. pp. 527-530). Defendant appealed from the judgment entered (T. pp. 553-554).

The Trial Court refused to award liquidated damages, concluding that the defendant's failure to compensate the plaintiffs in accordance with the Fair Labor Standards Act was in good faith and that the defendant had reasonable grounds for believing its acts were not a violation of the Fair Labor Standards Act. Plaintiffs cross-appealed from such determination (T. p. 554).

The defendant company was engaged in the meat packing business. Its plant in Chicago, Illinois, covered an area of four city blocks. It purchased livestock in various parts of the United States for shipment to its Chicago plant. The meat products and by-products produced at Chicago were shipped by defendant throughout the United States. A total of four thousand persons were employed at the Chicago Plant, which included 276 employed in the mechanical division, whose duties were to maintain and repair buildings, machinery and equipment

at the plant. It should be noted that only 38 of the 149 employees involved in this suit testified at the trial. The personnel in this division were blacksmiths, carpenters, tinsmiths, electricians, painters, millwrights, steamfitters, elevator repair men, and others in like vocations. The shops comprising the mechanical division were grouped together within a space of 900 feet. Each of the 149 plaintiffs herein was employed in the mechanical division. Most of them spent a large portion of their time working outside of their assigned shops (T. p. 554).

The time involved herein is a five minute period from 7:55 A. M. to 8:00 A. M., when the plaintiffs reported to their respective shops, received instructions if necessary, obtained or removed their tools from tool chests and cabinets, and, when working away from their shop, left their shops carrying their tools or supplies to go where their work was assigned in other parts of the plant (T. pp. 554-555). This amount of time was set by stipulation of counsel prior to trial (T. pp. 430-432). Periods to time less than five minutes were omitted by agreement. These preliminary activities were held to be compensable by the Trial Court but the Court of Appeals held that they were *de minimis* under the doctrine of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (T. p. 559).

The Court of Appeals did not consider it necessary to consider certain issues raised in the appeal from the District Court, among which was the question of denial of liquidated damages which was raised on the plaintiffs' cross-appeal (T. p. 559).

STATUTES INVOLVED.

The statutes involved herein are Section 7 of the Fair Labor Standards Act, 52 Stat. 1063, 29 U. S. C. § 207, which requires a payment of time and one-half for all hours worked over the statutory workweek; Section 16(b) of that Act, 52 Stat. 1069, 29 U. S. C. § 216(b), which gives employees a cause of action for unpaid minimum wages and overtime payments.

Section 11 of the Portal-to-Portal Act of 1947, 61 Stat. 89, 29 U. S. C. § 261, which permits a court to withhold liquidated damages, or to award a lesser amount than that of the unpaid wages where the employer shows, to the satisfaction of the Court, that he acted in good faith and had reasonable grounds for believing he was not violating the Fair Labor Standards Act; Section 2(a) of the Portal-to-Portal Act of 1947, 61 Stat. 85, 29 U. S. C. § 252(a) which relieves employers from liability under the Fair Labor Standards Act unless the activity was compensable by the express provisions of a contract, or by custom or practice; and Section 2(c) of the Portal-to-Portal Act of 1947, 61 Stat. 85, 29 U. S. C. § 252(c) which sets forth standards for determining the amount of compensable time are not involved in this proceeding since the issue has not heretofore been raised in a lower court, or a lower court has not considered the issue.

SUMMARY OF ARGUMENT.

The petitioners have failed to set forth proper and sufficient grounds upon which the Supreme Court could issue a Writ of Certiorari under Rule 38(5) of the Rules of the Supreme Court. The Court of Appeals has not decided any question of federal law which has not been settled by this Court previously in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680; nor is the decision of the Circuit Court of Appeals for the Seventh Circuit in conflict with any decision of the Supreme Court.

The *de minimis* maxim is not limited by fixed and certain periods of time regularly and consistently worked. The maxim applies to insubstantial and insignificant periods of time spent in industrial activities. It is only when an employee is required to give up a *substantial* measure of his time and effort that compensable working time is involved. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 692.

The *de minimis* maxim was properly applied in this case by the Circuit Court of Appeals, and its application was consistent with the policy of the Fair Labor Standards Act. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 692. The question of *de minimis* is applied very liberally in working time computation in the industrial world. Rigidity of rules, wherever applicable, is purely for disciplinary purposes.

Petitioners seek to raise *for the first time*, a question of law concerning the applicability of Section 2(c) of the Portal-to-Portal Act of 1947. This issue was not presented to the District Court nor to the Court of Appeals. Petitioners cannot now raise this issue. Even treating the applicability of Section 2(c) of the Portal-to-Portal Act

of 1947 on its merits, it does not remove the applicability of the *de minimis* doctrine. Congress did not intend that Section 2(c) should or would change the computation of the statutory workweek, especially when it would make such computation more restrictive on employers than it was prior to the passage of the Portal-to-Portal Act of 1947.

Finally, petitioners seek to have this Court decide the question as to whether or not liquidated damages should be granted the plaintiffs. The District Court judge, using his sound judicial discretion, refused to grant liquidated damages to the plaintiffs. The issue was brought before the United States Court of Appeals for the Seventh Circuit on cross-appeal by the plaintiffs, but the Court of Appeals did not decide the issue as it had resolved the main issue in favor of the defendant below (T. p. 559). Since petitioners must first overcome the decision of the Court of Appeals on the main issue, it cannot now request the Supreme Court to review any such issue not previously decided by the Court of Appeals.

ARGUMENT.

I.

Petitioners have failed to set forth grounds upon which the Supreme Court could issue a Writ of Certiorari.

The petitioners seek to invoke the discretionary power of this Court by petitioning for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit for two reasons:

First, petitioners allege that the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court. Respondent submits that any pertinent and proper questions raised in the petition in this case and which were treated by the Court of Appeals, were fully and completely treated by this Court in the decision rendered in the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and constituted an affirmation of the principles enunciated by this Court in that decision.

Secondly, the petitioners allege that the Court of Appeals has decided a federal question (the scope of the *de minimis* maxim) in a way "probably" in conflict with applicable decisions of this Court. Respondent submits that the Court of Appeals has followed very closely the decision of this Court issued in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, on the issues involved herein and is not in conflict with any other applicable decision of this Court. The Court of Appeals clearly bases its decision regarding *de minimis* upon this Court's decision in the *Mt. Clemens Pottery Co.*, case, *supra*, and follows the language therein (T. pp. 557-559). This subject is more fully treated in this brief under subdivisions II and III below.

II.

The de minimis maxim is not limited by fixed and certain periods of time regularly and consistently worked.

The second point advanced by the plaintiffs is that where an employee is regularly and consistently required to work, the *de minimis* maxim is inapplicable to fixed and regular periods of time. The plaintiffs' attempt to distinguish this case from the *Mt. Clemens* case. The only difference between the cases cited by the Court and the facts in this case is that here, by stipulation, to aid the Court, the parties eliminated the first step of determining the amount of time to be considered by the Court. By inference in the stipulation, the plaintiffs have admitted that anything under five minutes per day is *de minimis*, as such time was eliminated by *agreement*. The only matter involved in this Court's opinion in the *Mt. Clemens* case, was the question presented over again in this Petition for Rehearing, as to whether or not a maximum of five minutes per day came within the area of the doctrine of *de minimis non curat lex* as set forth in the *Mt. Clemens* case.

In the *Mt. Clemens* case the fixed period of time involved was a maximum of fourteen (14) minutes which included some principal activities as well as preparatory activities. (See 69 Fed. Supp. 710, 711.) In this case a maximum of five (5) minutes is involved primarily for preparatory activities. Nothing in the *Mt. Clemens* decision makes an express contract provision a condition precedent to the application of the *de minimis* doctrine. It applies whether there is an express, implied or no contract provisions, solely on the question as to whether or not a small amount of time is involved. The Supreme Court stated in the *Mt. Clemens* decision at page 692:

> "Work of that character (preliminary activities) must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or practice."

The Court then stated the doctrine of *de minimis* in defining the statutory "workweek" (328 U. S. 680, 693).

Clearly, the Court of Appeals herein had a mandate from the Supreme Court of the United States in its decision in the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and it is set forth in the language contained in the opinion of the Court of Appeals (T. pp. 553-559). In each of the cases set forth under Point II of the Petitioners' brief (pp. 15-18), the time involved was a regular and consistent requirement and the only remaining factor was the question as to whether or not the *de minimis* doctrine applied. As has been pointed out heretofore, the parties in this case reduced the lower court's burden and eliminated the necessity of the Court measuring the amount of time involved, by stipulating that nothing more than five minutes per day was involved nor nothing less than five minutes per day was to be considered by the Court.

Plaintiffs cite a new case in *Mabee* v. *White Plaines Publishing Company*, 327 U. S. 178, which involves a treatment of the *de minimis* doctrine by the Supreme Court in determining whether or not an individual company was engaged in interstate commerce. Surely this is of no value in a case involving an entirely different subject matter of preliminary activities under the Fair Labor Standards Act. In addition, this case was decided *before* the case of *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680, and as such, is of little moment in situations similar to the *Mt. Clemens* case. The recent decision in the Court of Appeals for the Sixth Circuit, *Hunter* v. *Madison Avenue Corp.*, No. 10720, April 22, 1949, the Court stated

> "Where some inconsequential incident of interstate commerce happens to result from the general conduct of a fundamentally intrastate business, the rule of *de minimis* is applicable and the Act does not apply."

This case explains the application of *de minimis* to the question of whether or not an enterprise is engaged in interstate commerce so as to come within the Fair Labor Standards Act.

As a matter of fact, there was no regularity or consistency to the time involved herein. The opinion of the Court of Appeals points this out (T. pp. 553-554) by showing the difference in the amounts of the award of judgment as between the separate plaintiffs ranging from $5.05 to $168.53 for a four year period, and further (T. pp. 554-555) by its description of the activities of plaintiffs during the five minute period. As is pointed out in the opinion, the activities varied as between plaintiffs and even as to individual plaintiffs from day to day (T. pp. 554, 556).

Over a four year period, using the plaintiffs' own figures the total amount due each plaintiff on the plaintiffs' theory, is approximately $100.00. This involves approximately 48 cents a week, or approximately less than 1 cent per hour on a straight time basis. The so-called "split second" absurdities that the plaintiffs talk about on page 23 of their brief, which appeared in the *Mt. Clemens* case, totalled fourteen minutes per day, which is nearly three times the amount involved herein, yet, those fourteen minutes were considered to be non-compensable and within the *de minimis* doctrine by the Court in the *Mt. Clemens* case.

The plaintiffs herein performed the same type of preparatory activities as were considered by this Court in the case of *Anderson* v. *Mt. Clemens Pottery Co., supra.* The Court of Appeals so found (T. pp. 558-559) and cor-

rectly reached the conclusion that all such time was within the *de minimis* rule set forth by this Court in the *Mt. Clemens* case. In the *Mt. Clemens* case fourteen (14) minutes were involved. Here only five minutes are involved. No real question can be raised as to the applicability of the *de minimis* rule in this case. Even the Trial Court had some reservations concerning this question (T. pp. 41-42, 121, 124, 134-135, 429).

Petitioners seek to distinguish other cases cited in the opinion of the Court of Appeals from the present case. They point out that each of these cases (Brief pp. 16-17) involve preliminary activities of an uncertain amount of time. The regularity and consistency is in each of these cases to an equal extent that it is present in the instant case. The amount of time involved is the only uncertainty in the cases. In the case now before the Court, this uncertainty was eliminated by a stipulation of counsel, thereby easing the burden of the Trial Court in determining the amount of time involved.

The petitioners have failed to show any error or grounds as to why this Court should grant a Writ of Certiorari to the Court of Appeals.

III.

The de minimis maxim was properly applied by the Court of Appeals, and is consistent with the policy of the Fair Labor Standards Act.

The Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor from the inception of the Act, has consistently interpreted the Fair Labor Standards Act as requiring that an employee be treated as being at work "for all time he is required to be on duty or on his employer's premises or to be at a prescribed work-place, and for all time reasonably to be de-

scribed as '*all* in a day's work'." (See Part 516.4 Record Keeping Regulations, issued October 21, 1938, 3 W. H. R. 31 at 32 and Interpretation Bulletin No. 13, 1944-45 W. H. Man. 172.)

The Supreme Court in determining compensable work time for purposes of the Act, has adopted three broad criteria, or indicia, of work: (1) Physical or mental exertion (whether burdensome or not; (2) exertion controlled or required by the employer; (3) exertion pursued necessarily and primarily for the benefit of the employer and his business. *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680. Thus the concept of worktime developed by the Administrator is consistent with that stated by the Supreme Court. At the same time, however, the Administrator has also recognized that *all* "worktime" is not necessarily compensable, and in the enforcement of the law, has, in effect, applied the doctrine of "*de minimis.*"

The Administrator has recognized that before compensation must be paid for non-productive worktime, such time must be "considerable." See paragraph 3, Interpretative Bulletin, *supra*, where the Administrator stated:

> "If the employer requires the employees to punch a time clock and the employee is required to be present for a *considerable* period of time before doing so, such time will be considered hours worked." (Emphasis ours.)

Accordingly, the Wage and Hour Division has approved employer practices in a relatively large plant of computing hours worked and wages from the start to finish of a productive work shift even though employees affected checked in or out fifteen to twenty-five minutes before and after the start or finish of each shift. 1944-45 W. H. Man. 234.

In the administration of the Walsh-Healey Act, 41 U. S. C. 35 *et seq.*, the Administrator has followed similar prac-

tices. For example, in response to an inquiry as to whether an employee must be treated as "at work" under the Walsh-Healey Act when walking between the time clock and his working place, the Administrator stated:

> "* * * the Department will not question any reasonable time allowance to permit any employee to go from the timekeeping office to his place of work. The period of from five to ten minutes, as referred to in your letter, would not be regarded as working time under the Act." 1944-45 W. H. Man. 1193.

Replying to another inquiry on compensable worktime, he ruled:

> "* * * As to recorded time, the Department makes allowance for a reasonable period of time to cover the period between the time an employee ceases work and the time he punches out on his card. However, a period in excess of fifteen minutes is regarded as unreasonable." 5 W. H. R. 148.

Thus, thus, the Administrator of the Wage and Hour and Public Contracts Division speaks of "considerable" time spent in preliminary activity before such periods will be considered to be compensable worktime. In addition, the Administrator takes cognizance of agreement, as well as established custom and usage in determining what may be "considerable," to avoid rigidity and inflexibility in the administration of these related statutes.

With reference to "travel time" the Administrator has recognized that the realities preclude adoption of a precise formula for application in every case. In Interpretative Bulletin No. 13, paragraph 9, he states:

> "The problem of travel time, in relation to hours worked, arises in a great variety of situations and no precise mathematical formula will provide the answer in every case. The question is often one of degree; * * *."

Moreover, in instances where an employee is directed to report to work at some place other than the employer's place of business, the Administrator has ruled that working time begins "at the time he reports for work unless the traveling time required in order to reach the place * * * is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer." Interpretative Bulletin No. 13, paragraph 12. What is "unreasonably disproportionate" is a question of fact in each case and reasonable standards agreed upon by the parties will be acceptable for purposes of the Act. The Administrator has stated:

> "What is unreasonably disproportionate depends upon the facts in the particular case and reasonable standards agreed upon between the employer and employee will be accepted for purposes of the Act." *Idem*

Again, with reference to employees who are required to travel continuously and perform labor while traveling, the Administrator has said:

> "No precise formula will decide this type of case and any reasonable agreement entered into between the parties or established by *custom and usage* * * * will be respected by this Division in its enforcement policy." Interpretative Bulletin No. 13, paragraph 14.

In view of the last quoted excerpt from Interpretative Bulletin No. 13, it cannot be doubted that the Administrator attaches great weight to custom and usage in applying the doctrine of *"de minimis."* In addition, he has stated in paragraph 2 of the same Bulletin that "the Act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for purposes of enforcement of the wage and hour standards."

Thus, it is obvious that the Administrator has developed a practical rule for applying *"de minimis"* to preliminary

worktime before and after shifts. (It is our understanding that in inspecting for compliance with the Wage-Hour Act inspection officers are instructed to disregard as working time any period up to fifteen minutes at the beginning and end of each shift.) Such time to be compensable must be "considerable" as determined in relation to what is "reasonable" in light of all the facts of a particular situation. This administrative rule as to *"de minimis"* obviously has taken into consideration the important factor of established custom and usage and the human give and take on both sides of the employment relationship. (See Interpretative Bulletin, No. 13, paragraph 14, *supra.*)

It is well settled that the practical administrative interpretation of an ambiguous or uncertain statute by the executive department charged with its administration or enforcement is entitled to the highest respect and though not controlling will not be disturbed except for very cogent and persuasive reasons. (See the many cases cited in the annotations in 84 L. ed. 28, and 73 L. ed. 322, *et seq.*) As stated by the Supreme Court, the administrative interpretations of the Wage-Hour Administrator "while not controlling on the courts, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance." *Skidmore* v. *Swift and Company,* 323 U. S. 134, 89 L. ed. 124, 65 S. Ct. 161. In other words, the rulings, interpretations and opinions of the Wage-Hour Administrator are to be accorded great respect by the courts. These administrative rulings, interpretations and opinions are particularly relevant to any judicial application of the *"de minimis"* doctrine since they recognize the realities of the industrial world and have been applied according to the practicalities of industrial operations in the light of custom and usage.

Employers generally have resorted to and relied upon interpretations and policies of the Wage and Hour Ad-

ministrator, and it was held by the Supreme Court to be entirely proper. (*Skidmore* v. *Swift & Co.*, 65 S. Ct. 161.) Indeed, had they not done so the Administrator would no doubt have compelled such observance. It is submitted, therefore, that no court should penalize parties for having relied upon administrative interpretations and policies except in cases where such administrative interpretations or policies are clearly erroneous under the statute involved. Obviously, such is not the case here with respect to the administrative application of *"de minimis."*

While the courts generally have not yet had occasion to apply the *"de minimis"* doctrine to worktime questions, District Judge Kirkpatrick has recognized that what is compensable worktime is to be tested by the standard of reasonableness. In applying *"de minimis"* to a case before him, Judge Kirkpatrick stated:

> "The true test is whether the employee was unreasonably deprived of time which he should have had free." *Cameron* v. *Bendix Aviation Corp.* (D. C. E. Pa. 1946), 65 Fed. Supp. 510.

In effect, therefore, Judge Kirkpatrick adopted the Administrator's policy as a guide in applying the *de minimis* doctrine to the facts before him.

It is not contended here that the administrative practices must be blindly adhered to in applying the *de minimis* doctrine to every case. It is contended, however, that the basic test of what is reasonable in view of all the circumstances of a case is the only true test as to how the *de minimis* doctrine is to be applied.

Since the Administrator has definite enforcement responsibilities under the statute, it must be recognized that he has applied his rule on *de minimis* in a fashion not detrimental to employees. It follows, therefore, that his rules, as applied, indicate that the very shortest of periods of worktime may be disregarded under the doctrine

of *de minimis*. That this is so was recognized by Judge Kirkpatrick in the *Bendix* case, 65 Fed. Supp. 510, when he said:

> "To interpret the Act any more strictly than the Administrator himself has done, it seems to me, would lead to the elimination of all reasonable human give and take adjustments on both sides and would probably be more detrimental in the long run to the interests of the employees than to those of the employer."

The Supreme Court in the *Mt. Clemens* case made it clear that the "workweek contemplated by Section 7(a) must be computed in light of the realities of the industrial world" (328 U. S. 680; 692). It also made clear that the determination of what constitutes compensable time within the statutory workweek must be made with full effect given the doctrine of *de minimis*. The Court stated at p. 692:

> "It is only when an employee is required to give up a *substantial* measure of his time and effort that compensable working time is involved." (Emphasis ours.)

What is "substantial" must, of course, be judged upon the basis of what is reasonable in the light of all the factors present in a particular situation.

Thus, the Court, by making a "substantial" amount of preliminary time the criterion for compensation, has apparently subscribed to the test of reasonableness formulated by the Administrator and applied by Judge Kirkpatrick in the *Bendix* case.

Granting that the Supreme Court decision in *Jewel Ridge Coal Corporation* v. *Local 6167 UMWA*, 325 U. S. 161, 89 L. ed. 1534, 65 S. Ct. 1063, seems to preclude custom or contract as bearing on the determination of the overall statutory workweek, it does not follow that established custom and usage is not to be considered as a guide in disregarding non-productive worktime under the *de minimis* doctrine. On the contrary, the Supreme Court did

contemplate that custom and usage be considered as a factor in applying *de minimus,* since custom and usage obviously are part of the industrial realities under which compensable worktime must be determined. Therefore, *de minimis* must be applied in the light of what is "substantial" and "reasonable" in view of all the factors present in each case, including custom and usage.

The Supreme Court said in *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, that the activities in that case compelled the employees to spend an estimated 2 to 12 minutes daily, if not more, in walking on the premises and in referring to these activities, instructed the lower court to examine them in light of the realities of the industrial world and to apply the rule of *"de minimis non curat lex."* The Court inferred that a matter of 12 minutes, or more, would be *de minimis.* In the case before this Court a maxim of five (5) minutes is involved in some cases and less in others.

On remand, Judge Picard, in the United States District Court for the Eastern District of Michigan, 69 Fed. Sup. 710, after determining that the maximum amount of time spent in the activities of walking, changing clothes, greasing arms, putting on finger cots or gloves, preparing new equipment, turning on light and machine switches, scraping locks, etc., required a maximum, in any department of 9.6 minutes per day. He held in his opinion at page 719:

> "We hold, therefore, that excepting for the purpose of this decision, the theory that the Supreme Court set at least 12 minutes of walking time daily as not being *de minimis,* it did so with one, if not two, restrictions to be used in computing what these 12 minutes should cover:
>
> "(A) That it is only the walking time to and not from the work bench; or
>
> "(B) In no event can we consider walking time involved in going to and from lunch for one's own

'convenience and necessity', and which is not 'necessarily and primarily for the benefit of the employer and his business.'

"The maximum walking time under such yardstick that can be reckoned in favor of any Plaintiff in this case is 6.2 minutes daily (Mould Department).

"If, on the other hand, the Supreme Court did not intend to even intimate or indicate what it thought was *de minimis* in walking time, it is our opinion, and we hold that we would not go lower than 12 minutes as above restricted (the minority opinion indicates that 10 minutes would surely be *de minimis*) and without setting any *de minimis* figure herein, hold all the walking and preliminary activities time consumed in this case is *de minimis.*"

Since Judge Picard has made his second decision in the case of *Anderson* v. *Mt. Clemens Pottery Company,* 69 Fed. Sup. 710, other courts have treated this question. In the case of *Timmons* v. *Wagoner County Coal Company,* (U.S.D.C. Eastern District of Oklahoma) 7-10-47, 13 Lab. Cas. § 64,696, Judge Broaddus stated:

"When the time required of an employee in reaching the points where such employee begins his services, as entering upon the premises of the employer, is trivial and only a few minutes in duration, no extra compensation for such time is due to the employee." *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, 692; Retrial D. C. E. D. Mich. 69 Fed. Sup. 710.

The judge then determined that the amount of time involved in this case was three minutes going to work and three minutes returning from work, all of which was subject to the "*de minimis*" rule.

On July 17, 1947, in the case of *McIntyre* v. *Seagram & Sons Company,* U. S. D. C., W. D. Ky., 72 Fed. Sup. 366, Judge Shelbourne, of that Court, held as follows, at page 372:

"The evidence in this case conclusively shows that

> the plaintiff, proceeding with reasonable dispatch, could, after punching in on the time clock, proceed to his locker, change a soiled for a clean uniform, change his clothing and report to his foreman ready for productive work in from ten to twenty minutes. Such time is within the *'de minimis'* rule." *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680; 68 Fed. Sup. 710.

On September 26, 1947, in *Adkins* v. *E. I. DuPont de Nemours Company, Inc.,* Civil No. 1816, 13 Lab. Cas. 64,025, the United States District Court for the Northern District of Oklahoma, upheld the constitutionality of the Portal-to-Portal Act of 1947 and dismissed the action for lack of jurisdiction. This was a suit brought under the provisions of the Fair Labor Standards Act and involved so-called "Portal-to-Portal" claims based on "travel" and "make ready" activities.

The special master in the *Adkins* case had concluded, among other things, that the time spent by plaintiffs in such activities, ranging from eight minutes to twenty-one or twenty-two minutes per day, was subject to the *de minimis* doctrine by the Supreme Court in *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, and, therefore, was not compensable. The court, however, concluded that since it lacked jurisdiction, it could not properly consider unrelated issues.

On July 28, 1948, Judge O'Connor for the U. S. District Court, Southern District of California, in the case of *Tully* v. *Joshua Hendy Corp.,* 15 Lab. Cases § 64,696, stated:

> "The Court in this instant case heretofore stated that if the plaintiffs had any evidence to show that they were directed to work during the noon hour and did perform services (substantial services) in accordance with the terms and provisions of the contract; they were entitled to be paid therefor, but that they would be bound by the terms of the contract; and,

> while the evidence does show that some services were performed during the lunch period, the men were in much the same position as those in the case decided by Judge Yankwich (*Devine, et al.* v. *Joshua Hendy Corp.*, 14 Lab. Cases § 64,496), and used their lunch period in much the same way. The Court concludes, therefore, in accordance with the Portal-to-Portal Act, that these services are not compensable and would also come under the *de minimis non curat lex* rule."

Clearly then, the five minutes or less time per day involved in this case, is subject to the doctrine of "*de minimis non curat lex.*" As has been pointed out above, the Supreme Court has indicated that twelve minutes would be *de minimis*. District Courts have stated that as high as twenty to twenty-two minutes would be *de minimis*. Certainly the amount of five minutes per day, or less involved in this case, comes well within the requirements set down by the Supreme Court in making insubstantial amounts of time subject to the *de minimis* rule.

Petitioners attempt to show that industry does not regard a five minute period as *de minimis*. In support of this theory petitioners cite certain studies of clauses in collective bargaining agreements. We are not here concerned with what has been worked out by certain companies in contracts with their employees.

The Supreme Court has fully treated this matter and reached its conclusions in the following language appearing in the *Mt. Clemens* case at page 692:

> "We do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible. The workweek contemplated by § 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the pol-

icy of the Fair Labor Standards Act. It is only when an employee is required to give up a *substantial* measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue." (Emphasis ours.)

This finding and conclusion by this Court is, of course, final and applicable to this case.

The defendant placed into the record copies of its contracts between the collective bargaining agent for the employees in question and the Company, which show that these employees have received payment for "fringe" items, such as twelve (12) minutes per day time for changing clothes, fifty (50) cents per week allowance for work clothing, furnishing of tools and equipment, pay for time for preparation of knives, furnishing meat hooks, safety equipment, second meal and time to eat same, eight paid holidays, guaranteed thirty-six (36) hour week, sick benefit plan, etc. (Deft. Exhibits 9 and 10, T. pp. 493-497). Unless there is some limitation placed on such "fringe" items such as applying the *de minimis* doctrine, under proper circumstances, an employer would never know what his labor costs were.

There is no basis for the plaintiffs' pure assumption that the defendant will revert back to an alleged practice, which admittedly ceased three and one-half years ago. Defendant has no such intent nor is there any basis for plaintiffs making any such assumption. This practice was stopped in July of 1945, almost a year before the Supreme Court decision in the *Mt. Clemens* case.

Although he did not join in the original appeal, the Solicitor for the United States Department of Labor was granted leave to file a brief as *amicus curiae* supporting

the Petition for Rehearing just prior to the date defendant's answer to said petition was due. The plaintiffs' attorney was formerly Regional Wage and Hour attorney at Chicago. The Court of Appeals, nevertheless, denied the Petition for Rehearing.

IV.

Petitioners now seek to raise issues in this court not heretofore raised in any court below, or not decided in the lower courts.

A.

The interpretation and application of Section 2(c) of the Portal Act has not been raised heretofore by the petitioners.

Petitioners show as one of the statutes involved in this case, Section 2(c) of the Portal-to-Portal Act of 1947 which reads as follows:

> "(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section."

(Petition for Writ of Certiorari, p. 6; Specification of Errors, Brief p. 11; Argument, Brief pp. 12-15.) This issue is entirely foreign to any issue previously raised by the petitioners in any pleadings or briefs below. The point was not raised in the District Court, it was not raised in the appeal to the Court of Appeals, nor in petitioners' petition for rehearing in said Court. Now, for the first time, petitioners seek to gain review of the decision of the Court of Appeals partially on this ground.

This Court has held that, on certiorari, the Supreme Court will not decide questions not dealt with by the Circuit Court of Appeals (*Owens* v. *Union Pac. R. Co.*, (1943) 63 S. Ct. 1271, 319 U. S. 715; *Burnet* v. *Commonwealth Improvement*, (1923) 53 S. Ct. 198, 287 U. S. 415; *Waterloo Distilling Corp.* v. *U. S.*, (1931) 51 S. Ct. 282, 282 U. S. 577; *Sonzinsky* v. *U. S.*, (1937), 57 S. Ct. 554, 300 U. S. 506).

Since this issue has not heretofore been dealt with nor considered below, the Supreme Court should not now take it into consideration.

However, to treat the issue briefly on its merits, the section above quoted must be considered in the light of the intent of the Portal-to-Portal Act. The Act is entitled "An act to *relieve employers* from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes." This being the purpose of the Act as a whole, it cannot be construed to place additional liabilities or punishments upon employers not previously placed upon them by the Fair Labor Standards Act of 1938 and its interpretations. The main purpose of the Portal Act is to *relieve employers* from certain liabilities and punishments, not to add new liabilities by changing the interpretation of the language of the Fair Labor Standards Act.

This being the case, the rulings of the Courts which interpret the Fair Labor Standards Act, still control unless specifically changed by the Portal-to-Portal Act. The definition of the workweek set forth by this Court in the *Mt. Clemens* case at page 692 is still controlling. This definition set forth the *de minimis* rule. The definition has been applied to the instant case and is entirely correct and in compliance with applicable decisions of the Supreme Court. Unless there is a substantial amount of time in-

volved, there is no time involved at all within the meaning of "Workweek" as contemplated in Section 7(a) of the Fair Labor Standards Act.

Nor does the language of Section 2(c) of the Portal Act forbid the application of the *de minimis* maxim to periods of time, however short, which are compensable by express contract. The maxim "*de minimis non curat lex*" is not limited by express contracts. The maxim has been applied in common law to all kinds of contracts, whether express or implied. Unless language of legislation specifically annuls a common law doctrine, such doctrine is not affected. Here the intent of Congress was not to create additional liabilities upon employers, but to relieve such employers of certain burdensome liabilities and penalties which arose from the previous interpretations of the Fair Labor Standards Act.

Congressional intent of this is evidenced by the following excerpts from the legislative history of the Portal-to-Portal Act of 1947:

> "Section 3 of the bill is a saving provision which affirmatively provides that section 2 will not release or extinguish any penalty or liability incurred under the Fair Labor Standards Act, the Walsh-Healey Act, or the Bacon-Davis Act prior to the date of enactment of the bill which is based upon activities other than portal-to-portal activities. This section does not change in any manner the status of any claim." (Senate Judiciary Committee's Report on H. R. 2157.)

Thereafter in the statement accompanying the Conference Report on H. R. 2157, the following appears at page 2:

> "The Senate amendment (section 3) provided that the provisions of section 2 of the Senate amendment which made past activities not compensable if not compensable under the contract, custom, or practice, should not be deemed to remove penalty or liability

under the afore-mentioned three Acts based on activities other than the ones so declared not to be compensable. This provision is omitted under the conference agreement as surplusage, and as fully covered by the provisions of section 2(c) of the bill as agreed to in conference, described above under this heading."

In explaining the Conference Report on the floor of the House (Congressional Record—House—5-1-47, p. 4515) Representative Walter, a member of the Conference Committee stated:

"There are certain provisions of the report which I believe require further explanation and clarification. The first relates to section 2(c). As indicated in our statement, the purpose of section 2(c) is to prevent the construction of subsection (a) relieving employers from liability for minimum wages which they now have and to make it clear that time worked includes only that time spent in activities which are compensable under subsection (a). However, neither section 2(c) nor section 2(a) is intended to create additional overtime liability in cases where employers now make special payments or allowances for certain specified activities of their employees which are not included in time worked, according to the contract or custom or practice.

"I have in mind payments or allowances at straight time, or in stipulated amounts, for clothes changing or washing up, or other so-called fringe awards, directed or approved by the National War Labor Board."

These portions of the legislative history show very clearly that the only intent of Section 2(c) of the Portal Act was to make it clear that no relief was granted from existing claims that were not covered by Sections 2(a) and 2(b). The intent is further shown that these claims, not barred by Sections 2(a) and (b), would stand on their merits under the existing interpretations of working time under the Fair Labor Standards Act. As has been pointed

out previously herein, there must be a *substantial* amount of time involved or there can be no recovery. The definition of "workweek" under Section 7(a) of the Fair Labor Standards Act set forth in the *Mt. Clemens* decision, 328 U. S. 680, 692, applies to employment contracts whether written or unwritten, express or implied. No other construction can be placed on this definition.

In its brief (p. 15) petitioners admit that the time involved is small. The Court of Appeals so found and applied the law as set forth by this Court. The decision of the Court of Appeals is not in conflict with any applicable decision of this Court.

This Court should not take this point into consideration since it was not raised or dealt with in the courts below.

B.

The issue of liquidated damages was not determined by the Court of Appeals, and this Court should not decide questions not dealt with by the Court of Appeals.

In exercising its sound discretion, the Trial Court refused to grant liquidated damages to the petitioners. Petitioners filed a cross-appeal on this question with the Court of Appeals, but the Court of Appeals did not decide the issue as it decided the main issue for the defendant below (T. p. 559). Petitioners now seek to have this Court decide an issue not considered or dealt with below. As pointed out above in this brief, the Supreme Court will not determine, on certiorari, issues not considered below. (*Owens* v. *Union Pac. R. Co.*, (1943) 63 S. Ct. 1271, 319 U. S. 715; *Burnet* v. *Commonwealth Improvement*, (1932) 53 S. Ct. 198, 287 U. S. 415; *Waterloo Distilling Corp.* v. *U. S.*, (1931) 51 S. Ct. 282, 282 U. S. 577; *Sonzinsky* v. *U. S.*, (1937) 57 S. Ct. 554, 300 U. S. 506.) This issue should not be considered on the petition for writ of certiorari.

Notwithstanding the fact that the Supreme Court, under its rules of procedure will not consider issues not treated below, the issue raised by the petitioners is without merit. Courts that have treated this matter under Section 11 of the Portal-to-Portal Act have decided that the court may, in its discretion, refuse to grant liquidated damages even though the employer's approach may have been unsound but not unreasonable. (*Jackson* v. *Northwest Airlines,* 75 Fed. Supp. 32); or that the employer did not wilfully or make any attempt to evade the law or violate the Act (*Sawyer* v. *Bay State Motor Express Co.,* 14 Lab. Cas. 64,417); or if the employer relied upon an inspection of the Wage and Hour Division, regardless of whether or not such inspection was a correct legal interpretation of the Act (*Bauler* v. *Pressed Steel Car Co.,* 81 Fed. Supp. 172); or good faith reliance on any administrative action on any one of the scores of Government agencies and their administrative practices or enforcement policies, including the statements of inspectors or their passive actions relative to the method used by the employer. (*Burke* v. *Mesta Machine Co.,* 79 Fed. Supp. 588.)

The intent of Congress was to allow relief wherever the employer demonstrates to the Trial judge that he had no intent to evade the provisions of the Act (see Congressional Record for February 28, 1947, page 1621). Likewise where the court finds that the violation was not in *bad* faith, the court has discretion as to the imposition of liquidated damages under Section 11 of the Portal Act. (Congressional Record, May 1, 1947, page 4513.)

There is sufficient evidence in the record to support the Trial Court's finding of denial of liquidated damages. (See T. 386-389, 403, 447-452, 523.)

Conclusion.

The petitioners have failed to show grounds which would warrant this Court granting their Petition for Writ of Certiorari. The Petition should be denied.

Respectfully submitted,

RICHARD C. WINKLER,
JOHN L. COCKRILL,
4100 S. Ashland Ave.,
Chicago, Illinois,
Counsel for Respondent.

May 9, 1949.

In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 722 and 723

JOHN W. FRANK ET AL., PETITIONERS

v.

WILSON & CO., INC.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The petition for writs of certiorari in this case presents questions of substantial importance in the administration and enforcement of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. I, 201. This memorandum, therefore, is submitted on behalf of the Administrator, as *amicus curiae,* to urge that the petition for certiorari be granted.

The court of appeals reversed the district court's judgment for petitioners on the ground that the *de minimis* doctrine precludes recovery

for a few minutes of work required of employees prior to their scheduled shift, although the period of time was fixed and regular, was required by strictly enforced company rule, and was made compensable by express agreement. This ruling, we believe, is not only a misapplication of the *Mt. Clemens* decision (328 U. S. 680), but is directly in conflict with the pertinent statutory provisions of the Portal Act, enacted subsequent to the *Mt. Clemens* decision, and establishes a dangerous precedent on an issue of considerable importance in the administration of the Fair Labor Standards Act. While superficially it may appear to be of little significance to the public interest in the administration of the Act whether a few minutes a day are to be included in computing the hours worked, the confusion and uncertainty that will result from annulling the settlement of such issues by contract or collective bargaining agreement are by no means trifling, as past experience has conclusively demonstrated.

This is not a case concerning short, irregular, and unascertainable periods of time, varying in amount for each employee, nor does it present a question of "split-second absurdities." Cf. *Mt. Clemens* case, 328 U. S. at 692. On the contrary, the question here is whether the *de minimis* doctrine shall relieve an employer from liability for a period of time which is fixed precisely, which is definite and regular every workday, which employees are required to work by a

strictly enforced company rule, and for which the employer has obligated himself to pay by collective bargaining agreement. The time involved amounts regularly to 25 minutes a week for each of 149 employees who work the full scheduled workweek. And, as the Court of Appeals states in its opinion, petitioners during the periods in question engaged in "their usual daily activities" (172 F. 2d 712, 714) and in "the same type of activity that they carried on from time to time throughout the day" (172 F. 2d at 715). The effect of applying the *de minimis* rule to such fixed, definite and regularly worked periods of time is to permit an employer systematically and arbitrarily to disregard periods of work at the beginning and end of a scheduled shift, and to prevent effective settlement of grievances over such periods even by express provision in a collective bargaining agreement.

We do not believe that the *Mt. Clemens* decision intended to sanction any such application of the *de minimis* doctrine. The reference in the *Mt. Clemens* decision to the possible applicability of the *de minimis* rule was predicated upon a factual situation quite different and clearly distinguishable. It involved uncertain and indefinite periods of time, varying for each individual employee, spent in walking from the time clock to their work benches, and in various preliminary activities prior to the commencement of productive activities. A most important and much em-

phasized factor in that case was the difficulty of ascertaining "the precise extent of uncompensated work" (328 U. S. at 687). Moreover, the employer had made no agreement to pay for such periods.

The enactment of the Portal-to-Portal Act of 1947 clearly indicates that the *de minimis* rule was not to be applicable to a case like this, in which the court below conceded that the activities in question "were covered by an express provision of a written contract." Section 2 of the Portal Act, which is applicable to the period prior to the passage of that Act (May 14, 1947), explicitly provided that *"in determining the time* for which an employer employed an employee [in applying the minimum wage and overtime provisions of the Fair Labor Standards Act] there shall be counted *all that time, but only that time"* which was compensable by express contract provision or by the custom or practice at the place of employment.[1] Section 4, which applies *in futuro,* prescribes the same test with respect to walking time and to "preliminary" and "postliminary" activities. The intent to include *"all"* such compensable time as "time worked" under the Fair Labor Standards Act could not have been stated more clearly. Cf. *Mabee* v. *White Plains Pub. Co.,* 327 U. S. 178 at 181–182.

---

[1] See Administrator's Interpretative Bulletin as to effect of the Portal Act on the Fair Labor Standards Act, Title 29, Code of Federal Regulations, 1947 Supp. 790.24. The full text of Section 2 of the Portal Act is reprinted in the Appendix, *infra,* pp. 7–8.

The result reached by the decision below is directly contrary not only to the express language of the Portal Act, but to the clear Congressional intent. During the course of the debates on the measure, it was suggested in the Senate that most of the problems might be solved by a *de minimis* rule applicable to all time less than a fixed amount. In explaining why such a proposal had not been adopted, Senator Cooper, one of the sponsors of the new legislation, pointed out that because of the uncertainties inherent in the application of a *de minimis* rule the result would be that "instead of reducing or eliminating this litigation, it would have been increased, as we believe, tenfold". 93 Cong. Rec. 2300. See also the Conference Report, which explains that one of the purposes of Section 2 (c) was "to emphasize that employers are not relieved from liability for the payment of minimum wages and overtime compensation * * * for any time during which the employee engaged in activities compensable under the rules above stated [i. e., by contract or custom]" (House Report No. 326, 80th Cong., 1st Sess. (1947) p. 10).

It is thus apparent that Congress, recognizing that differences over the question of compensation for such periods of time were not trifling, but were of considerable importance to both employer and employees, deliberately and advisedly removed these problems from the possible application of the *de minimis* rule and made the

agreement of the parties determinative. The Seventh Circuit's decision reopens the many knotty problems which have plagued the Administrator and the courts for a number of years, and which were largely responsible for the flood of litigation which precipitated the enactment of the Portal Act.

The general importance of the issue and the need for prompt review by this Court is further indicated by the fact that the Seventh Circuit's ruling has already been cited and followed as a precedent by the Sixth Circuit in *Smith* v. *Cleveland Pneumatic Tool Co.*, decided April 22, 1949.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be granted.

PHILIP B. PERLMAN,
Solicitor General.

WILLIAM S. TYSON,
Solicitor of Labor.

MAY 1949.

APPENDIX

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. I, 252:

SEC. 2.

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provi-

sions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

U. S. GOVERNMENT PRINTING OFFICE: 1949